IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 489

[redacted] INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE R. REICHER, JR.,
458 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles Phone MA. 6-9171.

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IN THE

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OCTOBER TERM, 1961

No. .....

TAK TRAK, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Tak Trak, Inc., prays that a writ of certiorari issue to the final judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 1, 1961, enforcing a decision and order of the National Labor Relations Board.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit [R. 266] is not yet reported. Copies of the Court's opinion and decree are attached hereto as Appendix "A".

The decision and order of the National Labor Relations Board is reported at 128 N. L. R. B. No. 103 and dated August 24, 1960 [R. 31-39].

The Intermediate Report and Recommended Order of the Trial Examiner is not reported, but is found at pages 10-30 of the record of the court below.

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on August 1, 1961. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

1. Did the Court of Appeals for the Ninth Circuit misapprehend and grossly misapply the Rule of this Court in *Universal Camera Corp. v. N. L. R. B.* requiring the finding of the Board to be supported by substantial evidence on the record as a whole by enforcing the order of the Board when the Board's decision was not supported by substantial evidence, considering the record as a whole?

2. Did the decision of the Court of Appeals for the Ninth Circuit refuse to follow well established rules of other circuits prohibiting the piling of inference upon inference and prohibiting the basing of findings upon inferences contrary to direct testimony in enforcing the Board's order in its decision, thereby creating a conflict between decisions of the Circuits?

Statutes Involved.

1. Section 8(a)(3) of the National Labor Relations Act, 29 U. S. C. Section 158(a)(3):

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or

(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

2. Section 8(a)(5) of the National Labor Relations Act, 29 U. S. C. Section 158(a)(5):

"to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

3. Section 10(e) of the National Labor Relations Act, 29 U. S. C. Section 160(e):

"The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and

enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as here-

inabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Statement of the Case.

Petitioner herein is a California corporation with its principal place of business in Los Angeles, California. It is engaged in the manufacture and sale of a product known as tackless stripping and other products used in the laying of carpets.

Essentially, the volume of production at Petitioner's plant is controlled by the output of six machines which drive the "tacks" into strips of wood. When this "tackless stripping" is used by the customer, it is attached to the floor around a room and carpet is affixed to the "tacks" which extend upward from the strip at an angle toward the walls of the room. This holds the carpet taut without the necessity of driving carpet tacks into the floor.

Time studies have established that it is possible for an operator of one of these six machines to produce, without extraordinary effort, about 25 cartons of tackless stripping in a shift [R. 11, 242-243].

Production figures for the six tacking machines in Petitioner's plant are prepared in the following manner: Each of the six machines has a counter which can be set to indicate the total number of strokes made by the machine during a given shift. Petitioner has determined that it takes 12 strokes of this machine to make one four-foot length of tackless stripping. By dividing twelve strokes into the total strokes shown on the counter, the result is the number of four-foot lengths produced during a given shift. Then, with

knowledge of the number of four-foot strips required to fill one carton, the number of cartons produced in a given shift by a given operator can be accurately computed. By a simple matter of mathematics, the total number of cartons per week can be computed. By dividing the total number of hours worked in a given week by the number of cartons produced during that week, the number of cartons per man-hour or 100 man-hours can be determined [R. 157-173 and Resp Exs. 4-6].

Petitioner's Exhibit "No. 6" shows the number of cartons of tackless stripping per 100 man-hours of work for each week during the period from February 13, 1959 through July 17, 1959. Computed correctly, with corrected figures [R. 190, 191, 248, 249] this document clearly shows that during the period of the weeks ending February 13, 1959, through June 11, 1959, there were counted strokes reflecting an average for that period of 104 cartons per one hundred man-hours. In contrast to this is the average of 91.8 cartons per hundred man-hours for the period of the week ending June 18, 1959, through the week ending July 17, 1959 [R. 170]. These production figures also include as production all of those strips which were classified as rejects, some of which could and some of which could not be salvaged [R. 170-173].

During the latter part of June, 1959, and the first part of July, there was an excessive amount of rejected material and production available for shipment was down [R. 173-176]. Customers had complained of the quality of the product [R. 109-123, 178-179; Resp. Exs. 7-8]. This was caused by intentional action on the part of the employees or "sabotage" [R.

195-197, 204-211, 214-216]. This intentional action consisted of the failure of employees to maintain the nail hoppers at the proper level and make for themselves the two simple types of adjustments they were capable of making. There were the refusals of the tacking machine operators to remove nails which had stuck in the chucks of the machines, and their intentionally turning the funnels the wrong way, causing "nailups" strips without the proper number of tacks [R. 221-229]. This was true of all of the operators. Also, other employees in addition to the operators were responsible for producing defective merchandise [R. 143-146].

Petitioner's employees were warned that if production and quality remained low, it could result in loss of their jobs [R. 145-147; 214-216; 240-241].

On July 12, 1959, Petitioner's general manager, Jerome Kraut, left on a business trip and did not return to the plant until the morning of July 16, 1959. Prior to his leaving, he gave orders to have the amount of overtime work reduced one hour per week by reducing the work week from forty-two and one-half hours to forty-one and one-half hours [R. 11, 139]. This reduction was put into effect on Monday, July 13, 1959 and during the afternoon of July 14, 1959, some of the employees congregated outside the plant to discuss the subject of the discontinuance of the overtime [R. 212]. One of the employees, Mr. Moore, came into the plant and inquired if the "cut" in overtime work was permanent. He was told by Renda Stillwell, day foreman, that the cutback was permanent [R. 211-213]. Moore apparently returned to the group of employees and told the men what Stillwell had told him [R. 213].

With this situation in existence at the plant, Mr. Kraut returned to the plant following his trip, on the morning of July 16, 1959. Mr. Stillwell and Mr. Ryder met with him in his office and brought with them the production records for the days Kraut was absent. They also related to him that during his absence the operators of the tacking machines deliberately slowed production by turning funnels the wrong way, not putting nails in the hoppers and mixing rejects with good material. He was informed that these maladjustments had existed with respect to all tacking machine operators [R. 135-141].

Mr. Kraut then reported this information to Mr. Linsky, the president of Tak Trak, Inc., and during the afternoon of July 16, 1959, Mr. Linsky made the decision to terminate the entire crew based upon the information given him by Kraut [R. 124-131]. During that evening, final paychecks were prepared for all employees. The right of the employer to discharge an employee, or all of his employees, is unquestioned so long as it is not motivated by employee activity of the type protected by Section 7. Poor productivity, intentional slowdowns or poor quality work is not protected activity. *N. L. R. B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705 (9th Cir., 1959).

Following the termination of all non-supervisory employees, and on July 17, 1959, Mr. Kraut was contacted by Kenneth Buckley, Union representative. Mr. Buckley told him that his Union represented the terminated employees. This was the first time Mr. Kraut had heard of any union activity at Tak Trak, Inc. [R. 148-149].

Following a hearing before the trial examiner on November 12, 13 and 16, 1959, the trial examiner found that the "closing of the plant on July 17, 1959, was decided upon as a device to avoid dealing with a union and that the loss of employment which then befell the 23 individuals named in the complaint is attributable to this purpose. By the closing of the plant . . . Respondent . . . thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act."

The National Labor Relations Board adopted the findings, conclusions and recommendations of the trial examiner, with certain exceptions to be discussed hereinafter, and upon petition for enforcement by the Board, the Circuit Court rendered its opinion enforcing the Board's order.

Reasons for Granting the Writ.

1. The decision of this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 488 (1950), has established the rule that the function of the Courts of Appeal in reviewing decisions of the National Labor Relations Board is to determine, whether, on the record as a whole, there is substantial evidence to support the findings of the Board. The following analysis will demonstrate that the Ninth Circuit failed to adhere to this standard in granting the Board's petition for enforcement herein.

Initially, it should be noted that in order for a violation of Section 8(a)(3) in the National Labor Relations Act, substantial evidence must be adduced to show: (1) that the employer knew the employee was engaging in a protected activity; (2) that the employee was dis-

charged because he had engaged in a protective activity; (3) that the discharge had the effect of discouraging or encouraging membership in a labor organization. *N. L. R. B. v. Kaiser Aluminum Corp.*, 217 F. 2d 306, 308 (9th Cir. 1954).

An examination of the evidence relied upon by the trial examiner and the Board will clearly demonstrate the lack of any substantial evidence of the existence of the factors outlined above.

In the face of flat denials on the part of Linsky, Kraut, Stillwell and Ryder that they knew nothing of the union until informed by the telephone call of July 17, 1959, from the Union representative, the trial examiner addressed himself to this question:

> "How the Respondent discovered that its employees were interested in the union, I do not know. It is possible that merely a shrewd guess is involved or that Stillwell overheard some discussion concerning the union as Gastelum did or that Bill Ryder, out of loyalty to his father, told the Superintendent what was going on" [R. 22].

In other words, the trial examiner could point to no specific evidence in the record as a whole which showed that Petitioner's President, Morris Linsky, had any knowledge of union activity at the time he made the decision to terminate Respondent's employees.

However, the Board did not adopt this portion of the trial examiner's finding [R. 32]. Instead, it relied upon the following:

> "(1) the fact that the discharge occurred less than 3 days after the first employee meeting held on July 14, 1959, to discuss the cutback in over-

time and advisability of obtaining union representation; (2) the Respondent's knowledge of the meeting as shown by the fact that Foreman Stillwell and Superintendent Ryder observed it, learned what its purpose was from employee Moore, and reported the matter to Plant Manager Kraut; (3) The statements made by Foreman Stillwell to Gastelum, Soto and Waggoner attributing the discharge to union activities . . ." [R. 32].

Now, admittedly Stillwell and Ryder observed the meeting of July 14, 1959, and from employee Moore learned that it was for the purpose of discussing the cut in overtime [R. 213, 231, 232]. This was reported to Mr. Kraut upon his return to the Plant [R. 234]; yet there are the uncontradicted denials by Stillwell and Ryder that they were told anything or knew anything of any union aspects of this meeting [R. 213, 234].

However, Petitioner submits that to infer from Kraut's knowledge of this meeting that Linsky had knowledge of union activity is an inference not supported by any evidence. To reach the conclusion that Linsky acquired knowledge of union activity in this manner would require (1) the inference that Ryder or Stillwell acquired knowledge of the fact that the meeting involved a discussion of union representation (2) the inference that they told this to Kraut, and (3) the inference that Kraut told this to Linsky. And all these inferences would be in the face of uncontradicted denials on the part of Stillwell, Ryder, Kraut and Linsky that they so communicated to Linsky [R. 152, 216, 234]. Actual knowledge of an employee meeting to discuss a cut in overtime is hardly substantial evi-

dence of knowledge of the union activity which is essential to the finding of the violation herein charged.

2. By enforcing the order of the Board herein, the Ninth Circuit has ignored the clearly established rule of the Fifth and Seventh Circuits prohibiting the piling of inference upon inference to support a finding in the face of direct evidence contrary to those inferences. Illustrative of the rule prohibiting the piling of inferences is the case of *N. L. R. B. v. National Paper Co.*, 216 F. 2d 859 (5th Cir. 1954). There, as in the instant case, one of the crucial issues was the sufficiency of the evidence to impute knowledge of the discharged employee's union membership to the employer. There, one employee had told the owner of a local restaurant of the discharged employee's union membership. This conversation was supposedly heard by one of the employer's supervisors, and the Board *inferred* that he communicated this fact to employer's superintendent who made the decision to discharge. In addressing itself to this point, the court stated:

> ". . . at least some legally justifiable inference of employer knowledge of a dischargee's union membership is an essential prerequisite to a valid finding of discriminatory discharge therefor.
>
> * * * * *
>
> "Testimony which requires the pyramiding of so many inferences in order to sustain a finding of a discriminatorily motivated discharge cannot legitimately substitute for that 'substantial evidence' essential to the enforcement of a Board order" (216 F. 2d 862, 863).

The principles enunciated in the *National Paper* case have been clearly stated in *N. L. R. B. v. Kaye*,

272 F. 2d 112 (7th Cir. 1959). There the court pointed out with respect to the finding of the trial examiner, approved by the Board:

> "The finding is based upon a dubious inference, in face of direct and positive evidence to the contrary. . . . *It has been held, and we think properly, that inferences contrary to direct testimony are not ordinarily sufficient to support a finding*". (272 F. 2d at 114). (Emphasis added.)

Also particularly in point is the decision of the Seventh Circuit in *Indiana Metal Products Corp. v. N. L. R. B.*, 202 F. 2d 613 (7th Cir. 1953). There, there was direct evidence that two of the employer's foremen had actual knowledge of union activity in the plant, and had made coercive statements to employees on two occasions following the discharge of the employee who was engaged in union activity. Although the court sustained the Board's finding that the coercive statements were made in violation of Section 8-(a)(1) of the Act, it refused to sustain the Board's inference that any such knowledge was communicated to management. The court concluded:

> ". . . It is well established that inference piled on inference is not a substitute for evidence.
>
> * * * * *
>
> "There is no basis in this record to justify the finding that Meyer was discharged because of his union activities except by employing the device of laying inference upon inference. We conclude from considering the record as a whole, there is no substantial evidence to sustain the Board's findings that Meyer was discharged because of his union activities" (202 F. 2d at 616, 618).

As discussed above under the subject of lack of substantiality of the evidence, the finding of the Board of Linsky's knowledge of union activity was based upon "a dubious inference in the face of direct and positive evidence to the contrary". By allowing the pyramiding of these dubious inferences in order to sustain the finding of the Board, the Ninth Circuit has completely ignored the authorities of the cases decided by the other Circuits as discussed above, and by its refusal to adhere to the rule established by the other Circuits prohibiting the pyramiding of inferences, has created a conflict in decisions of the Circuits.

Conclusion.

The questions involved in this case are fundamental questions in the administration of labor relations under the National Labor Relations Act.

The decision of the court below upholding a decision of the Board which is clearly not supported by substantial evidence considering the record as a whole, is directly in conflict with the decision of this Honorable Court in *Universal Camera*.

Furthermore, the refusal by the Ninth Circuit to follow the well established rule of the other Circuits prohibiting the pyramiding of inferences in the face of direct testimony to the contrary to support a finding of the Board creates a conflict of decisions between Courts of Appeal and this question should properly be settled by this Court.

We respectfully submit that the petition for certiorari should be granted.

GEORGE R. RICHTER, JR.,
Counsel for Petitioner.

APPENDIX A.

Petition for Enforcement of an Order of the National Labor Relations Board.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Tak Trak, Inc., Respondent. No. 17,194. Aug. 1, 1961.

Before: Orr, Barnes and Hamley, Circuit Judges.

Per Curiam:

The National Labor Relations Board (hereinafter the Board) has petitioned this court for enforcement of its decree directing respondent Tak Trak to cease and desist from certain unfair labor practices and to reinstate twenty-three named employees.

Respondent Tak Trak discharged its entire work force shortly after a majority of the workers had signed cards authorizing representation by Painters District Council No. 36 and Its Affiliated Unions, AFL-CIO (hereinafter the union).

The Board found that respondent had violated §§8-(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 USCA §151 et seq., because of its coercive management tactics, because of the mass discharge, and because of a failure to bargain collectively with the union.

The sole question for decision is whether or not the findings of the Board are supported by substantial evidence. A careful examination of the record convinces us that they are.

The petition of the Board for enforcement of its decree is granted.

(Endorsed) Per Curiam Opinion Filed Aug. 1, 1961.
Frank H. Schmid, Clerk.